Sprint

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January 26, 2005

Via Electronic Submission

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

Re: *Ex Parte* Presentation
Sprint Petition for Declaratory Ruling, CC Docket No. 01-92

Dear Ms. Dortch:

This letter is to inform you that on this date, Charles McKee of Sprint Corporation met with Jennifer Manner, Legal Advisor to Commissioner Abernathy, to discuss issues related to Sprint's Petition for Declaratory Ruling on Wireless Rating and Routing in CC Docket No. 01-92. A copy of the presentation materials distributed and discussed at the meeting is attached hereto.

Pursuant to Section 1.1206 of the Commission's rules, this letter is being electronically filed with your office. Please associate this letter with the file in the above-referenced proceeding.

Respectfully submitted,

Charles W. McKee

cc: Jennifer Manner

SPRINT PETITION FOR DECLARATORY RULING
WIRELESS RATING AND ROUTING

CC-01-92

EX PARTE PRESENTATION

January 26, 2005

The Facts Underlying Sprint's Petition

- In 2001, Sprint extended its coverage to Macclenny, FL, an area served by Northeast Florida Telephone (NE-FL), about 20 miles west of Jacksonville.
- Sprint obtained from NANPA "locally rated" numbers so family and neighbors of Sprint customers could be called on a local basis – consistent with the manner in which it provides service in all areas.
- NE-FL and the transit carrier (BellSouth) refused to load Sprint's local numbers. According to these ILECs, Sprint must interconnect directly with NE-FL in order to provide local services in Macclenny.
- Sprint and NE-FL do not exchange sufficient traffic volumes to justify the cost of a direct connection.
- A direct connection would increase costs in serving rural areas without any public benefit.
- Four years later, Sprint is still unable to sell local service in Macclenny – and compete with NE-FL – because of ILEC refusal to honor its rating designation.

Indirect Interconnection

- Section 251(a) explicitly provides that carriers like CMRS and RLECs can connect "directly or indirectly."
- The RLEC position that direct interconnection is required under FCC rules is inconsistent with Section 251(a).
- RLEC reliance on Section 251(c) is misplaced.
  - Section 251(c) imposes "additional obligations" on ILECs; it does not limit the obligations imposed under 251(a).
  - Section 251(c) is not relevant because of the Section 251(f)(1) "rural exemption."
- The obligation to pay the costs of exchanging traffic with another carrier is not a "more burdensome" 251(c) interconnection obligation.

Direct Interconnection

- FCC Rule 20.11(a) provides that a "local exchange carrier *must provide* the type of interconnection reasonably requested by a mobile service licensee" (emphasis added).

- RLEC assertion that it is the incumbent that determines whether wireless carrier connects directly or indirectly is without support. *See Virginia Arbitration Order*, 17 FCC Rcd at 27085 ¶ 88 (ILEC cannot force CLEC to use direct end office interconnection even when traffic flows exceed DS-1 level). See also, Pennsylvania Commission Order, Tennessee Commission Order.

Transit

- Section 251(c)(2) requires RBOCs to interconnect with requesting carriers for the "transmission and routing of telephone exchange service and exchange access."
- Nothing in the statute limits this obligation to the exchange of traffic with the RBOCs' own end-user customers.
- The Section 251(a) right of indirect interconnection becomes meaningless if RBOCs can ignore their transiting obligations.
- The originating carrier – wireless carrier for M-L traffic/RLEC for L-M traffic – is responsible for paying the RBOC's transit costs.

Right to Local Numbers

- Under FCC Rule 52.15, a carrier can obtain numbers in "each rate center or service area in which it provides telecommunications service."
- FCC has acknowledged that to "enable the rating of incoming wireline calls as local, wireless carriers typically associate NXXs with wireline rate centers that cover either the business or residence of end-users." *NRO NPRM*, 14 FCC Rcd at 10371 n.174.
- Industry number assignment guidelines recognize that the rating point (LEC rate center) need not be the same as the routing point (LATA tandem switch). INC-95-0407-008 at § 6.2.2.
- If RLEC customers port a number to a wireless carrier, the wireless carrier must continue to use the same rating point (rate center). *Intermodal LNP Order*, 18 FCC Rcd at 23708 ¶ 28. Separate rating and routing points are a prerequisite for LNP.

Non-Discrimination/Dialing Parity

- Section 202(a) prohibits ILECs from engaging in unreasonable discrimination.
- FCC Rule 51.207 specifies that a LEC "shall permit" its customers to "dial the same number of digits to make a local call notwithstanding the identity of . . . the called party's telecommunications service provider."
- At issue here are local land-to-mobile (L-M) calls – calls that originate and terminate in the same LEC rate center.*
- RLEC attempts to require their customers to dial extra digits and/or incur toll charges in making a local L-M call would contravene Rule 51.207 and Section 202(a).

* Of course, wireless customers enjoy mobility. But such mobility imposes no costs on RLECs because the interconnection point remains the same and the wireless carrier assumes the additional cost of transporting the L-M call to the wireless customer if located outside the "home" exchange at the time.

Rural Consumer Interests

- The RLEC position restricts the choices of rural consumers and retards competition in rural areas.

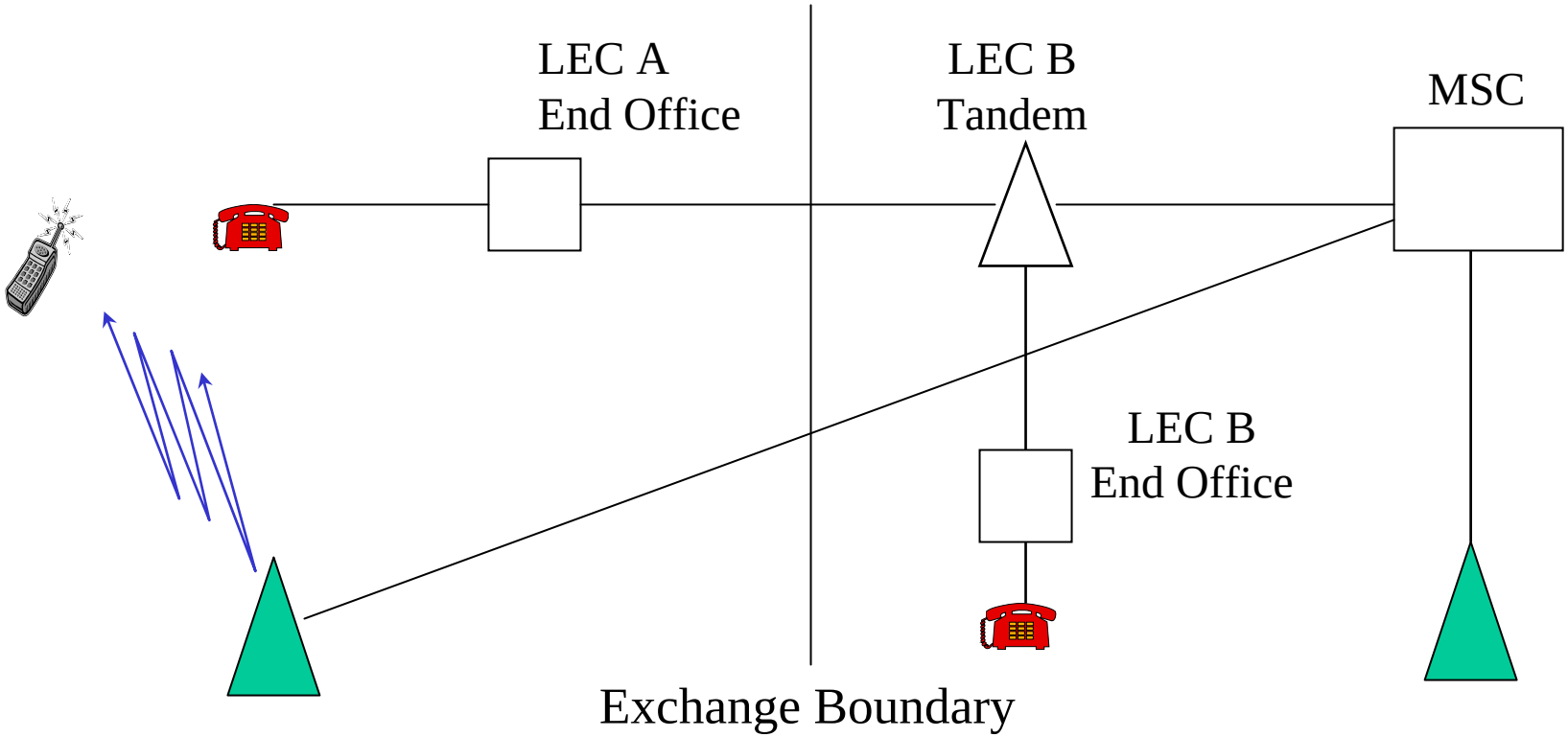
- The RLEC position discourages capital investment in rural areas and diverts resources to inefficient network construction.

- The RLEC position undermines the implementation of local number portability.

Relief Requested

- The Commission should reaffirm that:
  - Existing rules permit indirect interconnection;
  - ILECs cannot require direct interconnection for the exchange of local traffic;
  - ILECs must honor the rating and routing points that wireless carriers specify for L-M traffic – just as wireless carriers must honor the rating and routing points that ILECs specify for M-L traffic;
  - ILECs bear the cost of transporting L-M traffic to the same extent wireless carriers bear the cost of transporting M-L traffic;
  - Dialing parity rules require that wireless numbers (NXXs/thousands blocks) be treated in the same manner as wireline numbers.

GENERIC RATING AND ROUTING



1. CMRS provider obtains from NANPA a NPA/NXX rated from end office A rate center to serve local customers calling from home to wireless phone.
2. CMRS provider builds towers to provide wireless service in community where customer lives and markets service in LEC End Office A service area.
3. CMRS customer orders service from CMRS provider and is given a PCS number rate centered the same as LEC A End Office.
4. LEC A landline customers can call their PCS phones on a local basis.

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF NEBRASKA

WWC LICENSE, L.L.C., Plaintiff, v. ANNE C. BOYLE, Chairman, FRANK E. LANDIS, JR., Commissioner, LOWELL JOHNSON, Commissioner, ROD JOHNSON, JR., Commissioner GERALD L. VAP, Commissioner, and GREAT PLAINS COMMUNICATIONS, INC., Defendants.	)	4:03CV3393 MEMORANDUM OPINION

This matter is before the Court on plaintiff's complaint for declaratory and injunctive relief (Filing No. 1), defendant Great Plains Communications' answer, counterclaim and cross-claim (Filing No. 19) and defendant Nebraska Public Service Commission's answer to plaintiff's complaint and defendant Great Plains' cross-claims (Filing Nos. 21 and 26). The plaintiff and the defendants jointly stipulated to the record on appeal (Filing No. 27). The Court has reviewed the pleadings, the supporting briefs, the jointly stipulated record and the applicable law and finds as follows.

I. STANDARD OF REVIEW

In considering appeals of state commission orders, federal courts apply de novo review to questions of law. *Qwest Corp. v. Koppendrayer*, 2004 U.S. Dist. LEXIS 18438, *6-7 (D. Minn. Sept 13, 2004). The arbitrary and capricious standard

applies to district court review of state commissions' factual findings and application of law to fact. *Koppendrayer*, 2004 U.S. Dist. LEXIS at *7. Thus, the Nebraska Public Service Commission's ("Commission") interpretations of 47 U.S.C. § 252 is reviewed de novo while findings of fact, and the Commission's application of the law to those facts, are reviewed under an arbitrary and capricious standard. "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Bowman Transp. Inc. v. Arkansas-Best Freight Sys., Inc*., 419 U.S. 281, 285, 95 S. Ct. 438 (1974). Review of the Commission's evidentiary findings is limited to the record developed during the administrative proceeding. *See, e.g., United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15, 83 S. Ct. 1409 (1963).

II. BACKGROUND

This case is an appeal from two Nebraska Public Service Commission ("Commission") Orders which established an interconnection agreement between WWC License L.L.C., a wholly-owned subsidiary of Western Wireless Corporation ("Western Wireless"), and Great Plains Communications, Inc. ("Great Plains"). Western Wireless is a wireless provider licensed by the Federal Communication Commission ("FCC") to offer commercial mobile radio service ("CMRS") throughout much of Nebraska, including areas served by Great Plains. Great Plains is an incumbent local exchange carrier ("ILEC") certificated by the

Commission to provide local exchange and other telecommunications services in specific local exchange service areas in Nebraska.

On August 26, 2002, Western Wireless made a bona fide request to commence negotiations with Great Plains under 47 U.S.C. §§ 251-252 (the "Act"), to establish an interconnection agreement. The agreement would set forth the parties' obligations regarding interconnection, the payment of reciprocal compensation and the exchange of telecommunications traffic. Subsequently, Western Wireless and Great Plains negotiated under the Act resolving many, but not all open issues.

On January 23, 2003, Great Plains filed a Petition with the Commission seeking to arbitrate four unresolved issues pursuant to § 252(b) of the Act. Western Wireless filed a response identifying five additional issues. The Commission appointed an independent third party, Dr. Marlon Griffing, to serve as arbitrator. After discovery was conducted, the arbitration hearing took place on May 13-14, 2003. After the hearing, Griffing directed each party to submit a final offer on each open issue. Griffing then would select one final offer for each of the open issues.

Of the original nine issues, seven were submitted to Griffing for decision. The submitted issues were:

Issue 1: What should the definition of Great Plains' "Local Service Area" be for the purposes of the parties' interconnection agreement?

Issue 2: What traffic should be subject to reciprocal compensation in accordance with applicable FCC rules?

Issue 3: Is Great Plains' proposed reciprocal compensation rate appropriate pursuant to 47 U.S.C. § 252(d)(2)?

Issue 4: What is the appropriate effective date and term of the interconnection agreement, and what rate and total compensation for transport and termination of Western Wireless' telecommunications traffic on Great Plains' network is payable for the period prior to the effective date of the interconnection agreement pursuant to 47 C.F.R. § 51.715(d)?

Issue 6: How should interconnection facilities be priced and how should charges be shared?

Issue 7: How should Great Plains deliver land-to-mobile telecommunications traffic to Western Wireless?

Issue 8: Recognition of Western Wireless' NPA-NXXs with separate rating and routing points.[1]

On July 8, 2003, Griffing filed his decision. Great Plains and Western Wireless jointly prepared and filed an interconnection agreement with the Commission, incorporating jointly agreed to terms as well as the arbitrated terms. Oral argument was held before the Commission on August 19, 2003, and the Commission issued its Order on September 23, 2003. The Order rejected the filed agreement, reversed the arbitrator's decision on every issue and ordered the parties to amend and refile their agreement.

Great Plains filed an interconnection agreement incorporating the Commission's resolutions of the open issues on October 7, 2003. Western Wireless objected to certain terms it believed went beyond those resolved by the Commission. The

[1] Issue 5 was withdrawn prior to hearing and Issue 9 was resolved by agreement of the parties.

Commission approved the final agreement on October 21, 2003, as submitted by Great Plains.

On November 7, 2003, this complaint seeking declaratory and injunctive relief was filed by Western Wireless pursuant to § 252(e)(6) (Filing No. 1). The appeal challenges the Commission's Order and its approval of the final agreement.

On December 30, 2003, the defendant Great Plains filed its answer, counterclaim and cross-claim (Filing No. 19). In its counterclaim and cross-claim, Great Plains seeks retroactive compensation going back to March, 1998.

III. DISCUSSION

A. ISSUES 1 and 2: Application of Reciprocal Compensation

Issues 1 and 2 relate to the parties disagreement as to what calls are subject to reciprocal compensation under FCC rules. Plaintiff Western Wireless asserts that all calls between a local exchange carrier ("LEC") and a CMRS, originating and terminating within a single major trading area ("MTA") are subject to reciprocal compensation under FCC rules. 47 C.F.R. § 51.701(b)(2). The FCC did not create an exemption for these calls similar to one that exists for LEC to LEC calls that specifically limits reciprocal compensation obligations to calls within the landline local calling areas. *Atlas Telephone Co. v. Oklahoma Corp. Comm'n*, 309 F. Supp. 2d 1299, 1310 (W.D. Okla. 2004)("Atlas I"). Instead, the FCC adopted a different rule for LEC to CMRS access calls where the call originates and terminates within the same MTA. *Id. (citing* 47 C.F.R. 51.701(b)(2)). Under

this rule, reciprocal compensation obligations apply to all calls originated by Great Plains and terminated by Western Wireless within the same MTA, regardless of whether the calls are delivered via an intermediate carrier such as Qwest. *Id.* Thus, as a matter of federal law, the Commission erred in ruling that Great Plains owed no reciprocal compensation to Western Wireless for calls originated by Great Plains and terminated by Western Wireless within the same MTA, whether or not the call was delivered via an intermediate carrier. Therefore, this Court directs that the agreement between Great Plains and Western Wireless be modified to reflect that reciprocal compensation obligations apply to all calls originated by Great Plains and terminated by Western Wireless within the same MTA.

B. ISSUE 3: Reciprocal Compensation Rate

Issue 3 involves whether the appropriate rate for reciprocal compensation is the rate agreed to in the July agreement between Western Wireless and Great Plains or the higher rate determined by the Commission. This is an issue that is reviewed under the arbitrary and capricious standard. *Koppendrayer*, 2004 U.S. Dist. LEXIS at *7. As such, "this court should hold unlawful and set aside agency action if it is arbitrary, capricious, an abuse of discretion, contrary to constitutional right, or without observance of procedure required by law." *United States v. Massey*, 380 F.3d 437, 440 (8th Cir. 2004)(*citing Moore v. Custis*, 736 F.2d 1260, 1262 (8th Cir. 1984)). This standard of review is a narrow one and the Court is

not permitted to substitute its judgment for that of the agency. *Sierra Club v. Davies*, 955 F.2d 1188, 1192-93 (8th Cir. 1992). Here, the Commission's action did not raise constitutional implications. In addition, all applicable procedural requirements were met. As such, the Court concludes that the Commission did not err in its rate determination because its review and reasoning was neither arbitrary nor capricious. Therefore, this Court declines to modify or reverse the Commission's decision as to the reciprocal compensation rate.

C. ISSUE 4: Retroactive Compensation

Issue 4 addresses whether or not Great Plains is entitled to any retroactive compensation for calls originating on Western Wireless' network. In its cross-claim and counterclaim Great Plains seeks retroactive compensation going back to March, 1998, when it asserts that the first Western Wireless calls were terminated on Great Plains' network. The Commission determined retroactive compensation was owed from August 26, 2002, up until the date the Commission approved the Western Wireless and Great Plains agreement because August 26, 2002, is the date when Western Wireless made its bona fide request to commence negotiations with Great Plains under 47 U.S.C. §§ 251-252 (the "Act"), to establish an interconnection agreement. The Commission also determined that only Western Wireless owed retroactive compensation because it ruled that no Great Plains calls were terminated on the Western Wireless network.

Title 47, C.F.R. § 51.715(a) states that "upon request from a telecommunications carrier without an existing interconnection arrangement with an incumbent LEC, the incumbent LEC shall provide transport and termination of telecommunications traffic immediately under an interim arrangement."

In reviewing the Commission's retroactive compensation decision, this Court should not disturb the decision of the Commission absent a finding that the Commission's decision was arbitrary and capricious because the Commission's decision involved the application of law to the facts of the case. *Koppendrayer*, 2004 U.S. Dist. LEXIS at *7. Thus, this Court will not disturb the Commission's finding that retroactive compensation under 47 C.F.R. § 51.715 is called for from the date when Western Wireless transmitted a bona fide request for negotiations to Great Plains under § 252 –- August 26, 2002 -- because the Commission's decision was neither arbitrary nor capricious.

Having previously determined that reciprocal compensation obligations apply to all calls originated by Great Plains and terminated by Western Wireless within the same MTA, regardless of whether the calls are delivered via an intermediate carrier such as Qwest, reciprocal retroactive compensation, dating back to August 26, 2002, will apply to both Great Plains and Western Wireless.

D. ISSUE 6: Interconnection Facilities Pricing

Issue 6 concerns the appropriate pricing of interconnection facilities. Under the July Agreement, Western Wireless and Great Plains agreed that Western was to pay the lowest rate from among Great Plains inter-state and intra-state rates. The Commission rejected this portion of the July Agreement. Western Wireless asserts that the Commission erred in rejecting this portion of the negotiated agreement between Western Wireless and Great Plains under 47 U.S.C. § 252 and 47 C.F.R. § 51.709.

Any interconnection agreement adopted via arbitration must be submitted to the Commission for approval. 47 U.S.C. § 252(e)(1). Section 252(e)(2) specifies that the only grounds upon which the Commission may reject an agreement are §§ 251 and 252(d). Here, the Commission rejected the pricing agreement that was reached via arbitration. Thus, the rejection is appropriate only if it is based on either § 251 or § 252(d).

Section 252(d) requires that rates be just, reasonable and nondiscriminatory based on the cost of providing the interconnection facility. The Commission rejected the pricing agreement because it could violate Great Plains' filed tariff agreements. This appropriately falls under § 252(d). The Commission's decision must be upheld unless it is arbitrary and capricious. *Koppendrayer*, 2004 U.S. Dist. LEXIS at *7. Here, the decision to reject the pricing agreement was not arbitrary and capricious because it was grounded in assuring that the

pricing offered to Western Wireless was proper under Great Plains' filed tariffs. Therefore, the Court will not modify or overturn the decision of the Commission as to the pricing of interconnection facilities.

E. ISSUES 7 and 8: Local Dialing Parity and Tandem Routed Local Calling

Issues 7 and 8 are the final issues raised by Western Wireless. Here Western Wireless asserts that it must be given local dialing parity and tandem routed local calling. This issue was addressed in *Atlas v. Oklahoma Corp. Comm'n*, 309 F. Supp. 2d 1313 (W.D. Okla. 2004) ("Atlas II"). In *Atlas II*, the Oklahoma district court held that local dialing parity and tandem routed local calling were essential to allow a competitor to compete on a level playing field with an ILEC. *Atlas II,* 309 F. Supp. 2d at 1317. Western Wireless is not proposing that all calls within an MTA be provided local treatment, but only that calls from a Great Plains customer to a Western Wireless customer with a locally rated number would have local dialing. Thus, Great Plains is asked only to treat locally rated Western Wireless calls in the same manner that it treats its own locally rated calls. The Court adopts the reasoning of the *Atlas II* court and finds that local dialing parity and tandem routed local calling are consistent with the 1996 Telecommunications Act's general purposes without placing an undue burden on Great Plains.

F. Cross-claim - Unconstitutional Taking

Great Plains cross-claim against the Commission asserts that the Commission's failure to award Great Plains retroactive compensation back to March, 1998, constituted an unconstitutional taking of Great Plains property without compensation. The Commission asserts that the issue presented by Great Plains and Western Wireless to the Commission was raised pursuant to 47 C.F.R. § 51.715. Section 51.715 only provides for interim compensation after a request for negotiation is presented to an ILEC. In this case Western Wireless request for negotiation was presented to Great Plains on August 26, 2002. Thus, the Commission's Order was based on the issue presented.

State Commissions are limited to arbitrating open issues raised by the parties. *U.S. West Communications v. Minnesota Public Utilities Comm'n*, 55 F. Supp. 2d 968, 976-77 (D. Minn. 1999). Thus, the Commission lacked authority to arbitrate any issue beyond the scope of § 51.715, which specifically limited the compensation to the date when Western Wireless requested negotiations from Great Plains. Therefore, this Court must reject Great Plains' cross-claim asserting that the Commission's refusal to order compensation beyond that contemplated by § 51.715 constituted an unconstitutional taking.

IV. CONCLUSION

The Court will reverse the decision of the Nebraska Public Service Commission ("Commission") as to Issues 1 and 2 and direct that the agreement between Great Plains and Western

Wireless be modified to reflect that reciprocal compensation obligations apply to all calls originated by Great Plains and terminated by Western Wireless within the same MTA, in accordance with this Order. The Court will affirm the decision of the Commission as to Issues 3 and 6. The Court will affirm the decision of the Commission as to Issue 4 that retroactive compensation is appropriate going back to August 6, 2002 but, in accordance with the Court's decision as to Issues 1 and 2, will direct that retroactive compensation should apply to both Great Plains and Western Wireless. This resolution of Issue 4 also resolves Great Plains' counterclaim. Finally, as to Issues 7 and 8 the Court finds that local dialing parity and tandem routed local calling are consistent with the 1996 Telecommunications Act's general purposes without placing an undue burden on Great Plains. Thus, Great Plains will be ordered to treat locally rated Western Wireless calls in the same manner that it treats its own locally rated calls. Finally, Great Plains' cross-claim against the Commission will be denied because the Commission's decision limiting retroactive compensation did not constitute an unconstitutional taking of Great Plains' property without compensation. A separate order will be entered in accordance with this memorandum opinion.

DATED this 20th day of January, 2005.

BY THE COURT:

/s/ Lyle E. Strom

LYLE E. STROM, Senior Judge
United States District Court